

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 82
3030694

BETWEEN MANU TAEFU
Applicant

AND ALLIED SECURITY LIMITED
First Respondent

AND ALLIED INVESTMENTS
LIMITED
Second Respondent

Member of Authority: Trish MacKinnon

Representatives: Geoff O’Sullivan, Counsel for Applicant
Chris McDowall, Representative of First Respondent
Damian Black, Representative of Second Respondent

Investigation Meeting: On the papers

Submissions received: 6 and 17 August 2018 from Applicant
15 August 2018 from First and Second Respondents

Determination: 10 September 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Manu Taefu seeks the reopening of the Authority's investigation into this matter on the basis that my determination of 14 May 2018 did not correctly identify his employer¹. The reopening is sought for the purpose of recording Allied Investments Limited as the second respondent and the employer.

[2] Allied Security Limited and Allied Investments Limited oppose the application for reopening. Neither attended a telephone conference convened by the Authority to discuss how Mr Taefu's application would be progressed. However,

¹ [2018] NZERA Wellington 40.

when it was decided to determine the reopening application on the papers by way of submissions, both Allied Security Limited and Allied Investments Limited provided submissions in accordance with the Authority's timetable.

Relevant facts

[3] Mr Taefu lodged a statement of problem on 16 March 2017 citing Allied Security Limited as the respondent and former employer. Mr Chris McDowell, General Manager of Operations for the security firm operating as Allied Security, lodged a statement in reply on 16 May 2017. In it he named the respondent as Allied Investments Limited, a company of which he is a shareholder and one of two directors.

[4] Other than changing the name of the employer on the statement in reply form,² Mr McDowall made no comment on the identity of the employer. Nor did he draw the attention of the Authority Officer to any issue as to the employer's identity.

[5] The statement in reply responded succinctly to the claims made in the statement of problem. Mr McDowall attached to it 15 pages of documentation in support of the employer's position. This included correspondence with Mr Taefu on "Allied Security" letterhead regarding employment problems. It also included the transcript of a disciplinary meeting held with him. Mr Taefu's individual employment agreement was the third document provided. It cited the employer party as "Allied Security". There was no reference to Allied Investments Limited in any of the documentation.

[6] The change to the respondent's name appears to have gone unnoticed at the time by both Mr Taefu and the Authority. An Authority Officer referred the matter to mediation which the parties attended on 29 August 2017. As the matter did not resolve there, the file was referred to me on 20 October 2017 and a telephone conference was convened with the parties on 6 November 2017.

[7] Mr McDowall attended the telephone conference for the employer and arrangements were put in train for an Authority investigation meeting to take place on 8 February 2018. Mr McDowall provided an extensive brief of evidence on "Allied

² Employment Relations Authority Regulations 2000, reg 8(2)(b), Form 3.

Security" letterhead, accompanied by a further 37 pages of documents supporting the employer's position in defence of Mr Taefu's claims.

[8] Mr Michael Ellwood, who had been the Wellington Branch Manager for Allied Security and who had conducted the inquiry into the matters that led to Mr Taefu's termination of employment, also provided a brief of evidence. He too made no comment on the identity of the employer. Mr Ellwood, who had discussed with Mr McDowall his proposal to dismiss Mr Taefu, had subsequently resigned from his employment with Allied Security.

[9] Mr McDowell and Mr Ellwood attended the Authority's investigation meeting on 8 February 2018. When the correct naming of the employer was discussed as a preliminary issue, Mr McDowall asserted that Allied Investments Limited was the parent company of Allied Security and was Mr Taefu's employer but provided no documentary evidence of this. Mr McDowall made clear he was authorised to act for the employer.

[10] In the course of discussing this preliminary issue, there was a suggestion that both Allied Security Limited and Allied Investments Limited be cited as respondents. In my determination of the matter I recorded Allied Security Limited as the respondent. I awarded Mr Taefu \$6,725.25 gross in lost wages and \$15,000 as compensation for humiliation, loss of dignity and injury to feelings.

[11] Mr Taefu has not received the monies awarded to him. When Mr Taefu, through counsel, contacted Mr McDowell over payment of those monies, Mr McDowall referred his communication to Damian Black, the sole director and sole shareholder of Allied Security Limited. Mr Black, who is also a director and shareholder of Allied Investments Limited, advised Mr Taefu that he would "...need to apply to the courts for a name change regarding the judgement as Allied Security Ltd has been named in error".

[12] Mr Taefu's application for reopening is for the sole purpose of having Allied Investments Limited recorded as the second respondent in order that Mr Taefu can obtain the sums awarded to him in my determination of his substantive claims.

[13] Allied Investment Limited's entry in the Companies Office register currently contains the information that its trading name is Allied Security. Advice provided to

Mr Taefu by Allied Investment Limited's accountants confirm that information and also confirm that Allied Security Limited "is not used for the trading activities in regards to the security operations".

Legal considerations

[14] Clause 4, Schedule 2 of the Employment Relations Act 2000 provides as follows:

4 Reopening of investigation

- (1) The Authority may order an investigation to be reopened upon such terms as it thinks reasonable, and in the meantime to stay the effect of any order previously made.
- (2) The reopened investigation need not be carried out by the same member of the Authority

[15] The Authority's discretion in this is to be exercised according to principle. In *Davis v The Commissioner of Police* Judge Ford referred to the threshold test to be applied when the Employment Court is considering a rehearing application.³ This was "whether the applicant can establish a real or substantial risk of a miscarriage of justice if the judgment is allowed to stand."⁴

Discussion

[16] Mr Black, in his submissions on behalf of Allied Investments Limited, says Mr Taefu was an employee of that company during 2017 and did not raise any grievance with Allied Investments Limited after his dismissal. He submits the employer has not attended any mediation with Mr Taefu. It was not present at the Authority's investigation meeting and was not afforded an opportunity to defend itself against Mr Taefu's claims. Mr Black submits Allied Investments Limited was not involved in the proceedings in any way.

[17] He submits that, if the Authority finds a miscarriage of justice has occurred, its determination against Allied Security Limited should be set aside and proceedings initiated against Allied Investments Limited. If Allied Investments Limited is named as a party to the Authority's determination, Mr Black submits the matter should be reopened to allow that company to defend itself.

³ [2015] NZEmpC 38.

⁴ At [13].

[18] Mr McDowall made submissions on behalf of Allied Security Limited, citing himself as that company's representative. I note he is not listed as either a director or a shareholder of Allied Security Limited but is, as previously noted, both a director and a shareholder of Allied Investments Limited.

[19] In Mr McDowall's submission, because he was aware Allied Security Limited was not Mr Taefu's employer, he "did not prepare to defend the matter in any detail as a result." Mr McDowall submits he attended the Authority's hearing without expectation of having to defend the matter "as Allied Security Limited [was] clearly not the employer of Mr Taefu."

[20] I do not accept the submissions made on behalf of either Allied Investments Limited or Allied Security Limited for a number of reasons that I explain below.

[21] Mr Taefu raised his personal grievance for unjustifiable dismissal in writing with "Allied Security", for the attention of Mr Ellwood. Mr Ellwood, as previously noted, was at the time the Wellington Branch Manager for the company that operated as Allied Security. Subsequent events have persuaded me that Allied Security is the operating name for Allied Investments Limited. Mr Taefu's personal grievance was therefore quite properly raised with his employer.

[22] Mr Ellwood reported to Mr McDowall, the General Manager of Operations for Allied Security. He consulted with Mr McDowall during the disciplinary process involving Mr Taefu before dismissing Mr Taefu from his employment as a security guard. There can be no question that Allied Investments Limited had full knowledge of Mr Taefu's claims. It responded to those claims in the comprehensive statement in reply lodged by Mr McDowall.

[23] Mr McDowall inserted that company's name as respondent at the beginning of the Form 3 document and in the address for service section. He was well placed to respond on behalf of Allied Investments Limited, and to represent the employer in both mediation and the Authority's investigation meeting. As noted earlier, he is both a director and shareholder of Allied Investments Limited.

[24] I find Mr McDowall has significantly understated the part he played in the lead up to, and his attendance and participation in, the Authority's investigation

meeting. He fully participated in the Authority's investigation meeting, providing a detailed brief of evidence with, as noted earlier, 37 pages of attached documentation.

[25] Mr McDowall provided a number of other documents in support of the employer's position. He arranged for Mr Ellwood's attendance at the Authority's investigation, and attempted to locate another former employee to give evidence for the employer against Mr Taefu.

[26] There is no doubt that Mr McDowall was representing Mr Taefu's employer in the Authority's investigation meeting for which he had comprehensively prepared. His submission that he attended the hearing thinking he would not have to defend the matter is at odds with the documentation he prepared for it and with the manner in which he conducted himself the hearing. Mr McDowall's submission in that respect is at best, excessively modest and at worst, disingenuous.

[27] Mr Taefu submits the identity of the employer has been agreed by the parties to be Allied Investments Limited and that amending the name of the employer would not impact the substantive case the Authority heard on 8 February 2018. Nor would it impact on the substance of the determination.

[28] In Mr Taefu's submission there would be a serious miscarriage of justice if the matter were not to be reopened for the purpose of amending the employer identity. He would be prevented from collecting an award made in his favour by the Authority.

[29] I agree with those submissions. Mr Taefu was found to have been unjustifiably dismissed by his employer. Awards were made in his favour which he is currently unable to obtain. This is a situation in which there is a real miscarriage of justice due to his employment being attributed to the wrong entity.

[30] There are grounds to reopen the Authority's investigation to the extent of adding Allied Investments Limited as second respondent. There are no grounds for reopening the investigation for the purpose of rehearing the matter, as sought by Allied Investments Limited. That company, as the employer, was aware of Mr Taefu's claims and has already defended them vigorously in the Authority, albeit being wrongly cited as Allied Securities Limited.

Costs

[31] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority